



# **WATERS OF THE UNITED STATES: A BRIEF INTRODUCTION**

**Missouri Water Classification Work Group  
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**The Clean Water Act's stated objective is “to restore and maintain the chemical, physical and biological integrity of the Nation's waters.”**

**Most provisions in the CWA apply specifically to “navigable waters” (an expression used in the statute some 80 times).**

**Navigable waters are broadly defined in 502 of the CWA as “waters of the United States, including the territorial seas.”**

**Three Supreme Court cases have addressed the regulatory interpretation of waters of the United States...**

**United States v. Riverside Bayview Homes, Inc., et al. (Dec. 1985);**

**Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers et al. (SWANCC) (Jan. 2001); and**

**Rapanos et ux., et al. v. United States (June 2006).**

**In the Riverside Bayview Homes case, the Supreme Court unanimously held that...**

**The Corps acted reasonably in interpreting the CWA to require 404 permits for the discharge of material into “adjacent” wetlands (those wetlands located in close proximity to other waters of the United States).**

**Neither the imposition of a permit requirement nor the denial of a permit necessarily constitutes a taking.**

**In SWANCC, the Supreme Court held, in a 5 to 4 decision, that regulations adopted in 1986 and dubbed the Migratory Bird Rule exceeded the authority granted to the Corps under 404 of the CWA.**

**The Court determined that allowing federal agencies to claim jurisdiction over isolated ponds and mud flats falling within the Migratory Bird Rule would result in “a significant impingement of the State’s traditional and primary power over land and water use.”**

**The term “significant nexus” appeared for the first time in an opinion of the Court.**

**In Rapanos, a plurality (but not a majority) of the justices concluded...**

**“Wetlands are waters of the United States only if they bear the ‘significant nexus’ of physical connection” to other bodies that are waters of the United States in their own right.**

**Such waters are limited to “relatively permanent, standing or flowing bodies of water,” a category that includes “seasonal” rivers that carry water continuously except during “dry months.”**

**In a separate opinion, Justice Kennedy agreed that the case should be remanded to the lower courts (thereby forming a majority opinion on this specific issue). However, he argued that...**

**“Wetlands possess the requisite nexus...if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical and biological integrity of other covered waters....”**

**“The Corps may choose to identify categories of tributaries that...are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters.”**



**When there is no majority opinion on a specific issue considered in a Supreme Court case, controlling legal principles on that issue may be derived from principles espoused by five or more judges.**

**In December 2008, EPA and the Corps jointly issued 404 guidance for use by regional and district offices in the interpretation of Rapanos.**

**Pursuant to this guidance, a water is deemed jurisdictional “if either the plurality’s or Justice Kennedy’s standard is satisfied.”**



**Accordingly, for 404 permitting purposes, EPA and the Corps now assert categorical jurisdiction over the following waters:**

**Traditional navigable waters (TNWs);**

**Wetlands adjacent to TNWs;**

**Non-navigable tributaries of TNWs that are relatively permanent (i.e., that exhibit continuous flow at least seasonally); and**

**Wetlands that directly abut such tributaries.**

**Additionally, jurisdiction is asserted over the following waters whenever a case-specific analysis determines that such waters have a significant nexus with a TNW:**

**Non-navigable tributaries that are not relatively permanent;**

**Wetlands adjacent to non-navigable tributaries that are not relatively permanent; and**

**Wetlands adjacent to, but not directly abutting, a relatively permanent non-navigable tributary.**

**The significant nexus standard is applied by EPA and the Corps in the following manner:**

**A significant nexus analysis is performed to assess the flow characteristics and functions of the tributary and the functions of adjacent wetlands to determine if the bodies “significantly affect the chemical, physical and biological integrity of downstream TNWs.”**

**A significant nexus determination must include consideration of hydrological and ecological factors.**

**Upshot: Case law, regulations, and guidance applied in the 404 permitting program inform the decisions made in other CWA programs.**

**Although originally written to support 404 permitting actions, the interagency guidance document carries strong WQS implications.**

**In particular, all waters deemed “waters of the United States” are subject to the rebuttable presumption that they currently support, or potentially could support, CWA 101(a) uses.**





**For additional information on waters of the  
United States, see...**

**[http://water.epa.gov/lawsregs/guidance/  
wetlands/CWAwaters.cfm.](http://water.epa.gov/lawsregs/guidance/wetlands/CWAwaters.cfm)**